SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

NO. 857

DOROTHY K. NELSON, APPELLANT

vs.

RONALD KEITH MANLEY, a minor, by BLAINE MANLEY, his Guardian Ad Litem, APPELLEE

WAYNE L. SOSZKA, APPELLANT

vs.

JOSEPH NICK MANGANARO AND MARTHA A. ELIZABETH CANOUSE MANGANARO, APPELLEES

On Appeal from the Supreme Court of the State of Hawaii

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

The two cases noted above involved the same issue of law, namely the constitutionality of the Hawaii statute providing for service on a non-resident motorist by publication, and were consolidated for the purpose of appeal to the Supreme Court of the State of Hawaii. The decision

of that Supreme Court applied to both cases. However, in the case of Ronald Keith Manley, a minor, by Blaine Manley, his Guardian Ad Litem vs. Dorothy K. Nelson, the Appellant, Dorothy K. Nelson, elected not to appeal the final decision of the Supreme Court of Hawaii to the United States Supreme Court.

Therefore, the following is directed to the appeal of Wayne L. Soszka, Appellant vs. Joseph Nick Manganaro and Martha A. Elizabeth Canouse Manganaro, Appellees.

Appellant appeals from the final judgment of the Supreme Court of the State of Hawaii entered September 23, 1968 affirming the judgment and order of the Circuit Court of the First Judicial Circuit, State of Hawaii, (hereinafter called the First Circuit Court) denying Appellant's Motion to Quash Service of process on him on the grounds that the State statute under which such service of process was attempted was and is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of the Constitution of the State of Hawaii, being Article 1 Section 4.

OPINIONS BELOW

The Opinion and Order of the First Circuit Court, State of Hawaii is not reported. The opinion of the Supreme Court of Hawaii is not as yet officially reported. The Order of the First Circuit Court and the Opinion and Judgment of the Supreme Court of the State of Hawaii are set forth in the Appendix B and C.

JURISDICTION

The Appellees filed their Complaint in the First Circuit Court seeking damages for bodily injuries from the Appellant as a result of a collision between the automobile operated by Joseph Nick Manganaro and the automobile operated by the Appellant. The collision occurred in the

State of Hawaii. At the time the action was filed the Appellant no longer resided in Hawaii. Service of Notice of the action on the Appellant by publication in a Honolulu, Hawaii newspaper was ordered by the First Circuit Court, pursuant to Section 230-33 Revised Laws of Hawaii 1955, as amended.

Appellant, through an attorney employed by his insurer, made a special appearance and moved to quash service on the Appellant on the grounds that the provisions of the aforementioned statute providing for service by publication were repugnant to the due process clauses of the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Hawaii.

The Appellant's Motion was denied and Appellant thereupon filed a permitted Interlocutory Appeal to the Supreme Court of the State of Hawaii. Thereafter, in a written opinion filed June 27, 1968 the Supreme Court of the State of Hawaii affirmed the order of the First Circuit Court denying Appellant's Motion to Quash Service, holding that Section 230-33 Revised Laws of Hawaii 1955, as amended, providing for service by publication, was and is constitutionally valid under said due process clauses. On July 18, 1968 Appellant timely filed a Petition for Rehearing which was denied and the Judgment affirming the order of the lower court was entered September 23, 1968.

Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of the State of Hawaii on October 15, 1968, by Appellant, Wayne L. Soszka, and Appellant's Motion to Stay Mandate was granted October 30, 1968.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Hawaii on appeal is conferred by Title 28, United States Code, Section 1257(2) and Section 2101(c). That such jurisdiction exists in the circumstances of this

case is sustained by the following decisions: **Hess v. Pawloski,** 274 U.S. 352, 71 L.ed 1091, 47 S.Ct 632; **Wuchter v. Pizzutti,** 276 U.S. 13, 72 L.ed 446, 48 S.Ct 259; **Jamison v. Texas,** 318 U.S. 413, 87 L.ed 869, 63 S.Ct 669; **Cheseboro v. Los Angeles County Flood Control District,** 306 U.S. 459, 83 L.ed 921, 59 S.Ct 622; **Senn v. Tile Layers Protective Union,** 301 U.S. 468, 81 L.ed 1229, 57 S.Ct 857; **Nashville C. and St. L. R. Co. v. Walters,** 294 U.S. 405, 79 L.ed 949, 55 S.Ct 486.

STATUTE INVOLVED

The statute involved in this matter is Section 230-33 Revised Laws of Hawaii, 1955 as amended by Act 86 of the 1965 Session of the Hawaii State Legislature. The full text of said Section is set forth in Appendix A. The amendment in issue is as follows:

> "After service on the director of regulatory agencies, or his deputy, if the defendant cannot be found in the State since he has removed himself from the State and he cannot be found to serve or mail the summons after due diligence and the facts shall appear by affidavit or otherwise to the satisfaction of the judge, he may order that service be made by publication of summons in some newspaper suitable for the advertisement of notice of judicial proceedings for such length of time as he may deem reasonable, not less than once each week in four successive weeks, the last publication to be not less than twenty-one days prior to the date set for the trial of the action. The service of summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Such order and notice shall also set a date for the trial of the action."

QUESTIONS PRESENTED

1. Whether the amendment to Section 230-33 Revised Laws of Hawaii 1955, being Act 86 of the 1965 Hawaii State Legislature, providing for service on a non-resident

motorist by publication, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Supreme Court of the State of Hawaii erred in holding that said statutory provision is not repugnant to and does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the Supreme Court of the State of Hawaii erred in affirming the order of the First Circuit Court, denying Appellant's Motion to Quash Service made by publication under the provisions of said statutory section providing for service upon a non-resident motorist by publication.

STATEMENT

One of the Appellees, Joseph Nick Manganaro, and the Appellant, Wayne L. Soszka, were both members of the Armed Services on active duty stationed in Hawaii on April 16, 1965, the date of the automobile accident which formed the basis of the civil action which was filed on June 13, 1966 in the First Circuit Court, State of Hawaii, by Joseph Nick Manganaro and Martha Elizabeth Canouse Manganaro, plaintiffs, vs. Wayne L. Soszka, defendant, being Civil No. 19365 in said Court.

At an unknown date prior to the filing of the Complaint the Appellant had left the State of Hawaii and was no longer a resident thereof.

According to the Affidavit of Appellees' attorney, a certified copy of the Complaint and Summons was served on the Director of Regulatory Agencies (the proper Hawaii State official under the provisions of Section 230-33 Revised Laws of Hawaii 1955 as amended) on June 27, 1966 since the defendant (Appellant) could not be found in the State of Hawaii; and on June 28 and September 26, 1966 certified letters with return receipt re-

quested and postage prepaid, were sent to the defendant's (Appellant's) last known addresses in the State of California in which were enclosed certified copies of the Complaint and Summons and Notice of Service of Summons by Delivery of certified copy to the Director of Regulatory Agencies; that both letters were returned with the respective notations "no such number" and "moved, left no address." No return receipt signed by the defendant was filed.

Upon the return of the certified letters addressed to the defendant (Appellant), Appellees then sought and obtained from the First Circuit Court of Hawaii an order for service on the defendant by publication under the provisions of the second paragraph of Section 230-33 Revised Laws of Hawaii 1955 as amended, being the amendment added by Act 86 of the 1965 Legislature of the State of Hawaii.

On the return date of the published notice to the defendant-Appellant he made a special appearance by an attorney employed by his insurer and moved to quash the service of process on the ground that the statute under which service of process on him was attempted was constitutionally invalid under the due process clause of the Fourteenth Amendment to the United States Constitution and the like clause in the Constitution of the State of Hawaii.

After considering memoranda filed by the parties and argument, the First Circuit Court denied the Motion to Quash Service.

A permitted Interlocutory Appeal was taken by Appellant to the Supreme Court of Hawaii.

The Appellant has contended at every stage of the proceedings that the second paragraph of Section 230-33 Revised Laws of Hawaii 1955, as amended, violates the Fourteenth Amendment to the Constitution of the United States in that it authorizes the service of process by publication on a non-resident in an in personam action; does not within its terms provide for a reasonable probability that the

defendant will receive actual notice and denies to such non-resident notice of the action against him. These constitutional objections were considered but rejected both by the trial court, and by the Supreme Court of the State of Hawaii.

THE QUESTIONS ARE SUBSTANTIAL

This Appeal presents important constitutional questions involving the right of a non-resident motorist to notice of and an opportunity to be heard in a personal injury action against him growing out of an automobile accident in which he was involved in the State of Hawaii. The decision of the Supreme Court of Hawaii upholding the validity of the second paragraph of Section 230-33 Revised Laws of Hawaii 1955 as amended, carries obvious and far reaching implications. While the precise point in issue, viz, service by publication under non-resident motorists statutes, has not been, but ought to be, settled by The Supreme Court of the United States, we believe that fundamental principals regarding the right to notice and an opportunity to be heard, which have received repeated application in the decisions of this Court, compel the conclusion that the portion of the statute in question is constitutionally invalid.

In **Hess v. Pawloski,** 274 U.S. 352, 71 L.ed 1091 (1927) the Massachusetts statute under constitutional attack as being in violation of the due process clause of the Fourteenth Amendment to the United States Constitution provided, in substance, that a non-resident motorist using the Massachusetts highways thereby appointed a named state official as his agent for service of process in an action against him growing out of his use of a motor vehicle on the highways of Massachusetts. The statute also provided that

> ". . . such service shall be sufficient service upon said non-resident; provided, that notice of such service and

a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's Affidavit of Compliance herewith are appended to the writ and entered with the declaration."

In the decision upholding the constitutionality of this Massachusetts statute, Mr. Justice Butler said in part, (274 U.S. at Page 356)

"In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arises causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident is involved. **It required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents.** (Emphasis added)

The case of **Wuchter v. Pizzutti,** 276 U.S. 13, 72 L.ed 446 (1928), involved the validity, under the Fourteenth Amendment to the United States Constitution, of a statute of New Jersey providing for service of process on non-residents of the state in suits for injury caused by the negligent operation of automobiles on its highways. Mr. Chief Justice Taft said, in part: (Page 19)

"The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to

the non-resident defendant who is sued. Section 232 of the Laws of 1924 (the New Jersey statute under attack) makes no such requirement. . . . We think that a law with the effect of this one should make a reasonable provision for such probable communication. . . . The enforced acceptance of service of process on a state official by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise . . . it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (**Heinemann v. Pier,** 110 Wis. 185, 85 N.W. 646) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law."

The New Jersey statute was held to be constitutionally invalid because it "does not make provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit." (Page 26)

As Mr. Justice Jackson said, inter alia, in the case of **Mullane v. Central Hanover Bank and Trust Co.,** 339 U.S. 306, at Page 315:

"It would be idle to pretend that publication alone as prescribed here is a reliable means of acquainting interested parties of the fact that their rights are before the courts. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal

circulation the odds that the information will never reach him are large indeed."

We contend that the publication provisions of Section 230-33 Revised Laws of Hawaii 1955, as amended, do not create a reasonable probability that a non-resident motorist would be made aware that a lawsuit had been brought against him in the State of Hawaii.

The question presented in this Appeal has serious and far reaching implication of national importance. It affects the lives and fortunes of millions of interstate motorists. It would open a Pandora's Box of evil, fraud and mischief if state courts are permitted to recognize the existence of a right by a plaintiff in one state to obtain a default judgment against a defendant who resided in another state without the knowledge of the defendant and without giving him an opportunity to defend himself.

If the Supreme Court of Hawaii is correct in holding this statute not to be in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, then the door swings wide to allow injustice and deprivation of property without due process of law. This would raise the spectre of multiple and increased litigation. The Courts of the other forty-nine states would be faced with the constitutional question of giving or not giving full faith and credit to such a judgment of a sister state against one of its citizens.

The publication provision of the Hawaii non-resident motorist statute appears to be singular and unprecedented, but if upheld would undoubtedly spread to the other forty-nine states and create a national problem of personal judgments against persons, who would be denied notice and an opportunity to defend themselves against such judgments.

Further, if the Supreme Court of Hawaii is correct in

its decision the cases of **Hess v. Pawloski** and **Wuchter v. Pizzutti,** supra, are meaningless. The correctness of such a view of the Constitution can be settled only by a decision of this Court.

CONCLUSION

For the reasons stated, the questions presented by this Appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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APPENDIX A

CHAPTER 230
CIVIL ACTIONS, GENERALLY
SERVICE; EFFECT OF

§ 230-33. **Service in cases of operation of motor vehicles.** The use and operation by any person, whether a resident or a non-resident of the State, of any motor vehicle upon a public highway in this State shall be deemed equivalent to an appointment by such person of the (director of regulatory agencies) of the State to be his true and lawful attorney upon whom may be served the summons in any action or proceeding against him growing out of any accident or collision in which such person and such motor vehicle so used and operated may be involved. Such use and operation of such motor vehicle shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served upon him personally within this State, whether such person is a non-resident of this State or at the time a cause of action arises is a resident of this State but subsequently becomes a nonresident of this State. Service of such summons shall be made by leaving a certified copy thereof with the (director of regulatory agencies) of the State, or his deputy, who shall keep a record of each such summons and the day and hour of service upon such person, provided that notice of such service and a certified copy of the summons are served upon the defendant personally by any person authorized to serve process in the place in which he may be found or sent by registered mail, postage prepaid, with return receipt requested, by the plaintiff or his attorney to the defendant. The plaintiff or his attorney shall file an affidavit showing that such notice and such copy of summons were served as aforesaid or sent by registered mail as aforesaid, and in the latter case the return receipt shall be filed with such affidavit.

After service on the director of regulatory agencies, or his deputy, if the defendant cannot be found in the State since he has removed himself from the State and he cannot be found to serve or mail the summons after due diligence and the facts shall appear by affidavit or otherwise to the satisfaction of the judge, he may order that service be made by publication of summons in some newspaper suitable for the advertisement of notice of judicial proceedings for such length of time as he may deem reasonable, not less than once each week in four successive weeks, the last publication to be not less than twenty-one days prior to the date set for the trial of the action. The service of summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Such order and notice shall also set a date for the trial of the action.

The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

This section shall not be construed as repealing or amending any other provision of law relating to the service of process nor as establishing an exclusive method of service of process in cases to which this section may apply. (R.L. 1945, s. 10062.01; add. L. 1953, c. 167, ss. 1 and 2; R.L. 1955, s. 230-33; am. L. 1959, c. 15, s. 1; am. L. 1965, c. 86, s. 1)

"Director of regulatory agencies" substituted for "treasurer". § 14A-14.

Notice by certified mail. § 1-36.

L. 1959 amended the first par. principally by adding reference to residents.

L. 1965 added second par.

Second par. applicable to all actions pending in any courts of the State and any cause of action that may have arisen prior to May 14, 1965 and thereafter. L. 1965, c. 86, s. 2.

APPENDIX B

CIVIL NO. 19365

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

JOSEPH NICK MANGANARO and
MARTHA ELIZABETH CANOUSE
MANGANARO,

Plaintiffs,

vs.

WAYNE L. SOSZKA,

Defendant.

ORDER DENYING MOTION

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CIVIL NO. 19365

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JOSEPH NICK MANGANARO and
MARTHA ELIZABETH CANOUSE
MANGANARO,

Plaintiffs,

vs.

WAYNE L. SOSZKA,

Defendant.

ORDER DENYING MOTION

This cause came on for hearing on April 21, 1967 on Defendant's Motion to Quash, and the court having heard the argument of counsel and being fully advised,

IT IS ORDERED that the Defendant's motion be denied.

DATED at Honolulu, Hawaii, May 2, 1967.

BERNARD H. LEVINSON
Judge of the above entitled court

APPROVED as to Form:
LESLIE T. BENNETT
Attorney for Defendant

APPENDIX C

NO. 4667

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1967

RONALD KEITH MANLEY, a minor, by BLAINE MANLEY, his Guardian Ad Litem, Plaintiff-Appellee,	) CIVIL NO. 18801) APPEAL FROM THE ORDER ON DEFENDANT'S MOTION TO QUASH SERVICE
vs.	)
DOROTHY K. NELSON, Defendant-Appellant.	) FIRST CIRCUIT COURT) HON. BERNARD H. LEVINSON, Judge

NO. 4668

JOSEPH NICK MANGANARO and MARTHA ELIZABETH CANOUSE MANGANARO, Plaintiffs-Appellees,	) CIVIL NO. 19365) APPEAL FROM THE ORDER ON DEFENDANT'S MOTION TO QUASH SERVICE
vs.	)
WAYNE L. SOSZKA, Defendant-Appellant.	) FIRST CIRCUIT COURT) HON. BERNARD H. LEVINSON, Judge

OPINION OF THE COURT

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1967

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RONALD KEITH MANLEY, A MINOR, BY BLAINE MANLEY, HIS GUARDIAN AD LITEM v. DOROTHY K. NELSON

NO. 4667.

JOSEPH NICK MANGANARO AND MARTHA ELIZABETH CANOUSE MANGANARO v. WAYNE L. SOSZKA.

NO. 4668.

APPEALS FROM CIRCUIT COURT FIRST CIRCUIT, HON. BERNARD H. LEVINSON, JUDGE.

JUNE 27, 1968.

RICHARDSON, C. J., MIZUHA, MARUMOTO, ABE, JJ. AND CIRCUIT JUDGE FAIRBANKS IN PLACE OF LEVINSON, J., DISQUALIFIED.

Automobiles—process.

Section 230-33, R.L.H. 1955, as amended, in providing for service upon a nonresident motorist by registered mail requires that "return receipt shall be filed." The term "return receipt shall be filed" used in the statute requires the filing of an instrument containing the signature of a nonresident defendant acknowledging receipt of a registered mail.

Same—same—service by publication.

Defendants in operating automobiles within the State subjected themselves to the jurisdiction of our courts as to causes of action arising out of the operation of automobiles and service of summons by publication is suffi-

cient notice where plaintiffs are unable to notify nonresidents by registered mail of the pending action.

Constitutional law—due process.

Service of summons by publication as provided by the statute does not violate the due process clause.

OPINION OF THE COURT BY ABE, J.

These two cases involve services of process on nonresident motorists in two civil actions brought by citizens of Hawaii for injuries suffered in automobile collisions which occurred in the State of Hawaii.

In the case of Manley v. Nelson (No. 4667) after purported service on the Director of Regulatory Agencies as provided by § 230-33, R.L.H. 1955, as amended, an attempt was made to personally serve defendant at 87-153 D Makona Street, Waianae, Oahu, Hawaii, her last known address; however service could not be made upon defendant as she had left the State of Hawaii. Then plaintiff sent a registered mail, return receipt requested, to defendant at the same address, knowing that the mail would be returned unclaimed. Thereafter, service of summons was made by publication, setting the hearing on March 13, 1967, at 9:00 o'clock a.m. On March 13, 1967, defendant made a special appearance challenging the jurisdiction of the court through an attorney.

In the case of Manganaro v. Soszka (No. 4668), after the purported service on the defendant by service on the Director of Regulatory Agencies, a certified copy of the Complaint and Summons by certified mail, return receipt requested and postage prepaid, was sent on June 28 and September 26, 1966, addressed to defendant Wayne L. Soszka, 5935 Mission Street, San Francisco, California. Both letters were returned with notations "No such number" and "Moved, left no address." A notice of service by publication, setting the hearing at 9:00 o'clock a.m. on

March 21, 1967, was published. A default judgment was entered at 9:00 o'clock a.m. on March 21, 1967. The attorney for defendant upon being notified that the case was being heard that morning appeared one minute after 9:00 o'clock and made a special appearance, and the court rescinded the default.

The attorney for defendants in both cases moved to quash the process of service. After a hearing, the trial court denied the motion and allowed both defendants an interlocutory appeal.

The issue before this court is whether the trial court acquired jurisdiction over defendants in the two cases.

Section 230-33, R.L.H. 1955, as amended, provides for service of process and notice on a nonresident motorist, or a resident motorist who subsequent to a collision leaves the State of Hawaii, in suits or actions against him growing out of any accident or collision involving a motor vehicle operated by him in the State of Hawaii. This section provides that the Director of Regulatory Agencies shall be deemed to have been appointed by such person as his true and lawful attorney upon whom may be served the summons. This section also requires that after the certified copy is filed with the Director of Regulatory Agencies of the State of Hawaii or his deputy, a certified copy of the summons be "served upon the defendant personally by any person authorized to serve process in the place in which he may be found or sent by registered mail, postage prepaid, with return receipt requested, by the plaintiff or his attorney to the defendant. The plaintiff or his attorney shall file an affidavit showing that such notice and such copy of summons were served as aforesaid or sent by registered mail as aforesaid, and in the latter case the **return receipt** shall be filed with such affidavit." (Emphasis added.)

The first paragraph of § 230-33 is not only similar but

was based on the Massachusetts statute which was upheld in **Hess v. Pawloski,** 274 U.S. 352 (1927).[1] However, plaintiffs in both cases contend that as our statute requires the filing of "return receipt" and the Massachusetts statute requires the filing of "defendant's return receipt" there is a difference between the two statutes, and that the provisions of the first paragraph of § 230-33 is fulfilled when it is shown that the registered mail was not delivered to the defendants by reason of their having moved without leaving forwarding addresses. Their contention is that the term "return receipt shall be filed" means the filing of a card provided by the post office entitled "return receipt" without the signature of the addressee or any evidence showing that the addressee had received the same.

In upholding the Massachusetts statute, the U.S. Supreme Court in **Hess v. Pawloski, supra,** at page 356, said:

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. **It is required that he**

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[1]House Standing Committee Report No. 165, on H.B. 10, House Journal 1953, p. 567, reads in part to-wit: "Service of process on non-residents if often difficult or impossible. The validity and constitutionality of similar statutes notably that of Massachusetts, have been upheld by the courts. Hess v. Pawloski, 47 Sup. Ct. 632."

shall actually receive and receipt for notice of the service and a copy of the process. * * *" (Emphasis added.)

The House Committee Report shows that when the legislature enacted Act 163 in 1953, the legislators were cognizant of both the Massachusetts statute and the case of **Hess** v. **Pawloski, supra,** which had upheld the Massachusetts statute, and the legislators must have intended to meet the requirement stated by the U.S. Supreme Court in that case that defendant shall actually receive and receipt for notice of service and copy of the process.[2]

The word "receipt" is defined in **Webster's New International Dictionary,** Second Edition, as "[a] writing acknowledging the taking or receiving of goods or money delivered or paid."

The second paragraph of § 230-33, R.L.H. 1955, as amended by Act 86 enacted by the legislature in 1965 provided for service "by publication of summons in some newspaper suitable for the advertisement of notice of judicial proceedings for such length of time as he may deem reasonable, not less than once each week in four successive weeks, the last publication to be not less than twenty-one days prior to the date set for the trial of the action * * *" when a defendant had left the State of Hawaii and he could not be found to be served by registered mail.

House Standing Committee Report No. 617 in connection with the enactment of the 1965 amendment states in part:

> "It has been called to the attention of your Committee that there have been many cases in which a motorist while operating a vehicle in the State has caused an accident or collision and has removed himself from the State leaving no forwarding address. It is not possible to obtain jurisdiction over the defendant in this case be-

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[2]See footnote 1.

cause of the requirement of service by sending a registered letter to the defendant and evidence of the receipt of the letter. This bill will allow, after the director of regulatory agencies is served and after a showing that no address is available, the completion of service by publication as is provided in Section 230-31, Revised Laws of Hawaii 1955."

Let us also review the other statutes providing for service by mail.

Section 1-36, R.L.H. 1955, as amended, (Act 48, S.L.H. 1961) under which provision service was attempted in Case No. 4668 provides:

"Wherever a state statute provides for the giving of notice or service of legal process by registered mail the sending of such notice or service of such legal process may be made by means of a certified mail, **return receipt requested** and **deliver to addressee only.**" (Emphasis added.)

Section 230-32, R.L.H. 1955, pertaining to personal service on nonresidents provides:

"If the residence of such defendant be known, or shall be ascertained after publication of summons has been ordered, the judge may order personal service of a certified copy of the declaration or petition and summons and notice of the date of trial, either within or without the Territory, or service by registered mail with request for a return receipt which service, **evidenced by such receipt signed by the defendant** and returned to the clerk of the court, shall be regarded as equivalent to service by publication or in lieu thereof." (Emphasis added.)

As we have stated in **State v. Heirs of Halemano Kapahi,** 50 Haw. 237, 437 P.2d 321 (1968), "statutes having

reference to the same subject matter are in pari materia and are to be construed with reference to each other." See also **Territory** v. **Akase,** 43 Haw. 84 (1958).

We hold that the term "return receipt shall be filed" used in the first paragraph of § 230-33, R.L.H. 1955, as amended, requires the filing of an instrument containing the signature of a nonresident defendant acknowledging receipt of a registered or certified mail. Also, this is the interpretation courts in other jurisdictions have given to similar statutes. **Syracuse Trust** v. **Keller,** 35 Del. 304, 170 So. 259 (1932); **Spearman** v. **Stover,** 170 So. 259 (La. App. 1936).

We hold that in both cases, plaintiffs did not fulfill or meet the requirements of the first paragraph of § 230-33.

The other issue is whether the trial court may proceed with the trial of the cases and render judgment against defendants after publication of notice of proceedings under the second paragraph of § 230-33, R.L.H. 1955 (1965 Supplement) enacted by Act 86, S.L.H. 1965, hereinafter called Act 86.

The United States Supreme Court in **Kane** v. **New Jersey,** 242 U.S. 160 (1916) held that the state may, without violating the Constitution of the United States, forbid a nonresident to operate an automobile within the state unless he has authorized the state official to receive service of process in action brought against him arising out of the operation of the automobile within the state. The court said at page 167:

> "We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing

that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

Then, as a state may constitutionally forbid a nonresident to operate an automobile within the state, unless he has expressly authorized a state official to receive service of process in action brought against him arising out of the operation of the automobile within the state, may a state subject him to the jurisdiction of the courts in the state in such action although he has not expressly consented to the exercise of the jurisdiction? The United States Supreme Court in **Hess** v. **Pawloski, supra,** answered this question in the positive. The State of Hawaii has power to forbid any nonresident to drive or operate any vehicle within the State unless he first consents to the exercise of jurisdiction over him by the courts of the State as to the causes of action arising out of these acts.

In the exercise of its duty and responsibility to protect its citizens, the Legislature of the State of Hawaii enacted Act 86 and there is no question that it is a legitimate exercise of its police power, as a state in the interest of the public, may regulate the use of its highways by its residents as well as nonresidents. **Kane** v. **New Jersey, supra, Hess** v. **Pawloski, supra.** Defendants' contention is that Act 86 violates the provisions of the U.S. Constitution and the Constitution of the State of Hawaii as notice by publication does not meet the requirement of due process.

In **Mullane** v. **Central Hanover Bank & Trust Co.,** 339 U.S. 306 (1950) the court upheld the constitutionality of

published notice as to beneficiaries whose interests or addresses were unknown to the trustee and at page 317 stated:

> "This court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that situation permits and creates no constitutional bar to a final decree foreclosing their rights."

Further, we believe that under the provisions of Act 86, the "traditional notions of fair play and substantial justice"[3] are fully met as the statute requires a plaintiff to give a defendant notice of the pendency of an action by service of a certified copy of the summons "upon the defendant personally by any person authorized to serve process in the place in which he may be found or sent by registered mail, postage prepaid, with return receipt requested * * *." Then, only when he is unable to do so the act provides:

> "After service on the director of regulatory agencies, or his deputy, if the defendant cannot be found in the State since he has removed himself from the State and he cannot be found to serve or mail the summons after due diligence and the facts shall appear by affidavit or otherwise to the satisfaction of the judge, he may order that service be made by publication of summons in some newspaper suitable for the advertisement of notice of judicial proceedings for such length of time as he may deem reasonable, not less than once each week in four

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[3]Milliken v. Meyer, 311 U.S. 457, 463; International Shoe Co. v. Wash., 326 U.S. 310, 316.

successive weeks, the last publication to be not less than twenty-one days prior to the date set for the trial of the action. The service of summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Such order and notice shall also set a date for the trial of the action.

"The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action."

If a nonresident operator of a motor vehicle involved in an accident or collision sincerely desires to be informed when suit is commenced, it is a simple matter for him to leave with a person injured or suffering damages or involved in the collision or with a police officer investigating the accident his permanent address and if and when he changes his address to so notify the person or persons of the change.

By the term "traditional notions of fair play and substantial justice" we are not only concerned about a defendant, we must also consider the rights and interests of a plaintiff. Under § 230-33, as amended, before resorting to giving of notice by publication, a plaintiff is required to find out the address of a nonresident defendant so that service of notice may be made upon him either by a person authorized to serve process or by registered or certified mail. Publication of notice is the last resort when there is no other method of notifying a nonresident defendant. Thus, we hold that Act 86 is valid and does not violate the due process clause of the United States Constitution or the Constitution of the State of Hawaii.

Defendants, by operating automobiles within this State, subjected themselves to the jurisdiction of our courts as to causes of action arising out of the operation of automobiles in this State; and under the facts of the cases, we

hold that notice by publication was sufficient notice and the trial court may proceed with the trial of the two cases. Affirmed.

Leslie T. Bennett (Skinner, Bennett & Ornelles of counsel) for defendants-appellants.

Raymond J. Tam (Ikenaga and Tam of counsel) for plaintiff-appellee Ronald Keith Manley, a minor, by Blaine Manley, his Guardian Ad Litem.

Richard B. W. Ing (V. Thomas Rice on the brief, Rice & Lee of counsel) for plaintiffs-appellees Joseph Nick Manganaro and Martha Elizabeth Canouse Manganaro.

OPINION OF FAIRBANKS, J., DISSENTING IN PART

I concur with the majority on the constitutionality of § 230-33, R.L.H. 1955, as amended by Act 86, Session Laws of 1965.

I dissent in Manley v. Nelson on the ground that plaintiff did not make adequate investigation into the whereabouts of the defendant Nelson to justify publication of notice.

W. Z. FAIRBANKS

APPENDIX D

NO. 4667

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1967

RONALD KEITH MANLEY, a minor, by BLAINE MANLEY, his Guardian Ad Litem, Plaintiff-Appellee,	CIVIL NO. 18801
vs.	APPEAL FROM THE ORDER ON DEFENDANT'S MOTION TO QUASH SERVICE
DOROTHY K. NELSON, Defendant-Appellant.	FIRST CIRCUIT COURT HON. BERNARD H. LEVINSON, Judge

NO. 4668

JOSEPH NICK MANGANARO and MARTHA ELIZABETH CANOUSE MANGANARO, Plaintiffs-Appellees,	CIVIL NO. 19365
vs.	APPEAL FROM THE ORDER ON DEFENDANT'S MOTION TO QUASH SERVICE
WAYNE L. SOSZKA, Defendant-Appellant.	FIRST CIRCUIT COURT HON. BERNARD H. LEVINSON, Judge

JUDGMENT ON APPEAL

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NO. 4667

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RONALD KEITH MANLEY, a minor by BLAINE MANLEY, his Guardian Ad Litem, Plaintiff-Appellee,	CIVIL NO. 18801
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NO. 4668

JOSEPH NICK MANGANARO and MARTHA ELIZABETH CANOUSE MANGANARO,	) CIVIL NO. 19365
Plaintiffs-Appellees,	) APPEAL FROM THE ORDER ON DEFENDANT'S MOTION TO QUASH SERVICE
vs.	) FIRST CIRCUIT COURT
WAYNE L. SOSZKA,	) HON. BERNARD H. LEVINSON, Judge
Defendant-Appellant.	

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii, filed on June 27, 1968, the judgment of the circuit court is affirmed.

DATED: Honolulu, Hawaii, September 23, 1968.

BY THE COURT:
SAMUEL K. MAKEKAU
Clerk.

APPROVED:
KAZUHISA ABE
Justice

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 857

WAYNE L. SOSZKA, *Appellant,*

vs.

JOSEPH NICK MANGANARO and MARTHA A. ELIZABETH CANOUSE MANGANARO, *Appellees.*

On Appeal from the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 857

WAYNE L. SOSZKA,
Appellant,

vs.

JOSEPH NICK MANGANARO and MARTHA A. ELIZABETH CANOUSE MANGANARO,
Appellees.

On Appeal from the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL

Appellees move the Court to dismiss the appeal herein on the following grounds:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

QUESTION PRESENTED

Where a non-resident motorist is served by publication pursuant to a statute authorizing such service, are Fourteenth Amendment due process requirements met when it appears that such non-resident defendant cannot be located within or without the state, and that summons cannot be served neither personally nor by registered mail.

STATEMENT OF THE CASE

This cause was commenced on June 13, 1966, in the Circuit Court of the First Circuit, State of Hawaii, by Plaintiffs and Appellees, Joseph Nick Manganaro and Martha A. Elizabeth Canouse Manganaro, against Defendant and Appellant, Wayne L. Soszka. Appellees sought damages from Appellant for injuries suffered by them arising out of the operation of a motor vehicle by Appellant on the public highways of the State of Hawaii.

At the time of filing suit, Appellant could not be physically located within the State of Hawaii. Accordingly, service of process was next attempted by serving a certified copy of the Complaint and Summons on the Director of Regulatory Agencies, State of Hawaii, pursuant to Sections 230-33, Revised Laws of Hawaii, 1955, as amended (Hawaii's Non-resident Motorist Statute). Copies of the Complaint, Summons and Notice of Service of Summons by Delivery of a Certified Copy to the Director of Regulatory Agencies were forwarded by certified mail, postage prepaid, return receipt of addressee only requested, to Appellant

Soszka at his last known forwarding address in San Francisco, California, on June 28, 1966. These were returned by the Post Office Department with the notation "no such number." In mid-September, 1966, Appellees' further search indicated that Appellant was residing at a Berkeley, California, address. Copies of the Complaint, Summons and Notice of Service of Summons were sent by certified mail, postage prepaid, return receipt of addressee only requested, to Appellant's new, last known address. Once more they were returned by the post office with the notation "moved, left no address." On January 18, 1967, a Motion for Service by Publication, with accompanying affidavit setting forth the above facts, was filed with the First Circuit Court, State of Hawaii. The Court entered an order directing service by Publication and Notice and Summons were published in the Honolulu Advertiser as required by the statute. A default judgment was entered at 9:00 o'clock a.m. on March 21, 1967. The attorney for Appellant's insurance carrier, upon being notified that the case was being heard that morning, appeared one minute after 9:00 o'clock, made a special appearance to contest jurisdiction, and the Court set aside the default.

Appellant then moved to quash the process of service. After a hearing, the trial court denied the motion and allowed an interlocutory appeal. On appeal, the Supreme Court of Hawaii affirmed the Circuit Court ruling, finding the notice procedure of Section 230-33 R.L.H. as amended, in compliance with due process requirements. *Manley v. Nelson,* 50 Hawaii ....., 443 P. 2d 155 (June 27, 1968).

ARGUMENT

I

NOTICE PROCEDURE UNDER THE HAWAII NONRESIDENT MOTORIST STATUTE, (§230-33 R.L.H., AS AMENDED), MEETS RECOGNIZED DUE PROCESS REQUIREMENTS

It has long been recognized that a state may constitutionally designate some local official as agent to accept service of process for a non-resident motorist operating a motor vehicle upon the highways of that state as to actions arising out of the use of those highways. It is also recognized that when service of process is effected in this manner, the statute must also provide some method for the giving of notice to the non-resident principal in order to meet the requirements of due process. *Hess v. Pawlowski,* 274 U.S. 352, 71 L.ed. 1091 (1927). On this appeal, the defendant claims the Hawaii provision for notice to the non-resident defendant, i.e. by publication when efforts to locate him and give actual notice have failed, fails to meet the requirements of due process.

This Court has held that actual notice need not be given to the non-resident principal to sustain service of process made on his implied agent. Rather, to meet constitutional due process requirements, the statutory provision for notice must make it reasonably probable that notice will be communicated to the non-resident defendant. This standard has been expressed by this Court, in the following terms:

> ". . . It must be reasonably probable that he will receive actual notice." *Wuchter v. Pizzutti,* 276 U.S. 13, 72 L.ed. 446 (1928), at p. 19.

> ". . . It must be reasonably calculated, under all the circumstances, to apprise interested parties. . . ." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.ed. 865 (1950), at p. 314.
>
> ". . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at p. 315.

And legal writers have codified the standard, as follows:

> ". . . (A) state may properly provide for constructive or substituted service on non-residents without violating due process requirements, as in the case of use of highways by non-residents, although in all cases it should be made reasonably probable that defendant to be charged shall receive actual notice as a result of the constructive notice." 16A C.J.S., *Constitutional Law*, 619 at p. 791.

As defined by the Hawaii Supreme Court in the instant case, Section 230-33 R.L.H. as amended requires employment of the following procedure in giving notice to a non-resident defendant: First plaintiff must ascertain that defendant is no longer within the state. The Director of Regulatory Agencies must then be served with a copy of the Complaint and Summons. Copies of the Complaint and Summons and notification of service upon the Director must then be sent to defendant by registered or certified mail, return receipt requested of defendant only. To complete the service by registered mail, the return receipt, signed by defendant, must be filed with the Court. If this procedure cannot be completed, and the Court is

satisfied that plaintiff has made a diligent search and cannot in good faith locate defendant, the Court may allow plaintiff to complete service by publication pursuant to the statute.

The test of the constitutionality of this procedure is that it must be reasonably probable the defendant will actually receive notice under all the circumstances. To give actual notice the defendant must first be located. The statute provides that if defendant cannot be found within the state or elsewhere in order to personally serve the summons upon him by registered mail or otherwise, and the Court is so satisfied, it may order service by publication, with like effect as if defendant had been personally served within the state. This is all that is required by *Mullane v. Central Hanover Bank & Trust Co.,* Id. at p. 315: "The means (of notice) employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Although it is true that the required search for defendant will not always prove successful, such is not the demand of the constitutionality test.

Section 230-33 R.L.H. requires that if defendant cannot be located after diligent search, and the Court is so satisfied, an attempt must be made to notify defendant by publication. Admittedly, publication is not likely to result in effective notice, but at least plaintiff will have exhausted all possible avenues of notice. The Court, in *Mullane v. Central Hanover Bank & Trust Co., Id.* at p. 317, made the following revelant comment:

". . . This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."

II.

NOTICE PROCEDURE UNDER THE HAWAII NONRESIDENT MOTORIST STATUTE (§230-33 R.L.H.), IS CONSISTENT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

In light of the statutory requirement of diligent search, holding this statute invalid would, as a practical matter, lead to a requirement of actual notice. This would place an undue burden on the resident plaintiff, usually leaving him with no remedy against a defendant who commits a wrongful act and disappears from the jurisdiction, either leaving no forwarding address or, as is equally possible, refusing to accept a registered letter sent him. It is far more equitable, and equally within the demands of justice, to place the burden on the non-resident defendant to make his whereabouts known, than leave plaintiff without local remedy. As the Hawaii Supreme Court noted in the instant case:

"If a non-resident operator of a motor vehicle involved in an accident or collision sincerely de-

> sires to be informed when suit is commenced, it is a simple matter for him to leave with a person injured or suffering damages or involved in the collision or with a police officer investigating the accident his permanent address to so notify the person or persons of the change."

At least the non-resident motorist should certainly be stopped from denying notice, the lack of which stems from his imprudent failure to advise plaintiff of his whereabouts.

CONCLUSION

For the foregoing reasons, Appellees respectfully move the Court to dismiss the appeal herein and to affirm the holding of the Supreme Court of the State of Hawaii.

Dated, Honolulu, Hawaii,
March 14, 1969.

Respectfully submitted,
STUART M. COWAN,
Attorney for Appellees Joseph Nick Manganaro and Martha A. Elizabeth Canouse Manganaro.

GREENSTEIN & COWAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SOSZKA *v.* MANGANARO ET AL.

APPEAL FROM THE SUPREME COURT OF HAWAII.

No. 857., Decided April 7, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

END